

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SIDFREDO EARL VALDEZ,

Appellant.

No. 34008-9-II

UNPUBLISHED OPINION

Hunt, J. — Sidfredo Valdez appeals his sentence for first degree kidnapping. He argues that (1) his sentence exceeded the authorized sentencing range because it was based on an erroneously calculated offender score; and (2) because his sentence is, therefore, facially invalid, the trial court erroneously denied his motion for resentencing as untimely. The State concedes this error. Accepting the State's concession, we vacate Valdez's sentence and remand for resentencing.

FACTS

Sidfredo Valdez pleaded guilty to first degree burglary (count I), two counts of first degree kidnapping (counts II and III), and first degree robbery (count IV). On November 12, 1999, the trial court sentenced him to 57 months on count I, 130 months on count II, 51 months on count III, and 77 months on count IV, based on the following offender scores: six for counts I, II, and IV; and zero for count III.

Five and one-half years later, on May 6, 2005, Valdez moved the trial court to vacate his November 12, 1999 sentence and to resentence him. Ruling that Valdez had failed to meet the

legal criteria for granting a motion based upon CrR 7.8 and the relevant case law, the trial court denied the motion on October 3, 2005.

Valdez filed a direct appeal from denial of this motion on October 30, 2005.

ANALYSIS

RCW 10.73.090 (1998) requires that a motion collaterally attacking a judgment must be filed not more than one year after the final judgment. But this time limit does not apply if the judgment attacked is facially invalid. RCW 10.73.090(1) (1998); *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 865-866, 50 P.3d 618 (2002).

Valdez contends that the one-year time bar does not apply here or, alternatively, we should reinstate his direct appeal, because his judgment and sentence was facially invalid. We agree with his first contention and, therefore, do not address the second.

I. Standard of Review

When an offender score is miscalculated, the resulting “sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score.” *Goodwin*, 146 Wn.2d at 875-76. We consider matters of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

II. Facial Invalidity

A judgment is facially invalid when “the judgment and sentence evidences the invalidity without further elaboration.” *Goodwin*, 146 Wn.2d at 866. Because Goodwin’s miscalculated offender score made his judgment and sentence “invalid on its face,” the Supreme Court held that his personal restraint petition was “not barred” even though “he filed it over one year after the judgment was final.” *Goodwin*, 146 Wn.2d at 866-67. Similarly, Valdez’s judgment and sentence

is facially invalid because, as the State has conceded, it was based on an erroneously calculated offender score for count II.¹

Generally, offender scores for serious violent felonies increase by two points for each prior or current violent felony conviction. RCW 9.94A.360(9) (1998).² But the offender score does not increase by two points under this statute for counts that are to run consecutively, as do the sentences for counts II and III here. RCW 9.94A.400(1)(b) (1998).³

Because Valdez had two convictions for serious violent felonies, namely counts II and III (first degree kidnapping),⁴ his offender score for the most serious violent felony, count II, should have been calculated using his prior and current convictions that did not qualify as serious violent offenses. RCW 9.94A.400(1) (1998). Then, his offender score for each additional serious violent felony should have been “determined by using an offender score of zero.” RCW 9.94A.400(1)(b) (1998).

The trial court erred in calculating Valdez’s offender score for count II by wrongly adding two points to that score based on count III. Because Valdez’s sentence for the Count III serious violent felony was to run consecutively to his sentence for the count II serious violent felony, the

¹ The erroneous offender scores here yielded a standard sentencing range for Valdez’s combined convictions of 149-198 months confinement, as follows: 98-130 months for count II and 51-68 months for count III, serious violent offenses running consecutively to lesser counts I and IV, which ran concurrently with each other. RCW 9.94A.310(1) (1998) (now codified as RCW 9.94A.510(1)).

² Former RCW 9.94A.360(9) (1998) is now codified as RCW 9.94A.525(9).

³ Former RCW 9.94A.400(1)(b) (1998) is now codified as RCW 9.94A.589(1)(b).

⁴ RCW 9.94A.030(31)(a) (1998), which is now codified as RCW 9.94A.030(37)(a)(vi).

trial court should not have considered count III in calculating Valdez's offender score for count II. RCW 9.94A.400(1)(b) (1998). As a result of this error, Valdez's offender score was wrongly calculated as six instead of four. Based on a correct offender score of four for count II, Valdez's standard sentencing range for count II should have been 72-96 months, instead of the 98-130-month range that the trial court used. RCW 9.94A.310(1) (1998), RCW 9.94A.360(9) (1998).

We accept the State's concession that Valdez's offender score was miscalculated, making his judgment and sentence invalid on its face. Therefore, we hold that his appeal from the trial court's motion is not time barred. RCW 10.73.090(1) (1998); *Goodwin*, 146 Wn.2d at 865-66.

Accordingly, we vacate Valdez's sentence and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.